

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRINITY VASOS)	
Claimant)	
)	
VS.)	
)	
OFFICE DEPOT, INC.)	
Respondent)	Docket No. 1,051,876
)	
AND)	
)	
INDEMNITY INSURANCE CO. OF)	
NORTH AMERICA)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 20, 2012, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Ryan D. Weltz, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered respondent to provide medical treatment to claimant's left and right knees with Dr. Rasmussen, with the order to remain in effect pending conclusion of a full hearing on the claim. In so ordering, the ALJ impliedly found that claimant sustained accidental injuries to her bilateral knees that arose out of and in the course of her employment with respondent. The ALJ further ordered that respondent "shall not have ex parte communication with said authorized physician."¹

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 19, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

¹ ALJ Order (June 20, 2012).

ISSUES

Respondent requests review of whether claimant suffered personal injury by accident to her right lower extremity that arose out of and in the course of her employment with respondent. Further, respondent requests review of whether the ALJ had jurisdiction to prohibit respondent from having any ex parte communication with Dr. Rasmussen, claimant's authorized treating physician.

Claimant argues the evidence shows her right knee condition is related to her original left knee injury and was caused by overcompensating for her injured left knee. Claimant argues that respondent seems to argue that she sustained an intervening injury to her right knee while sleeping. Claimant contends the burden of proof is on the respondent to prove the existence of an intervening injury and that respondent did not carry that burden. Claimant asserts the Board does not have jurisdiction over the ALJ's directive that respondent not have any ex parte communications with Dr. Rasmussen.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by accident to her right lower extremity that arose out of and in the course of her employment with respondent?

(2) Does the ALJ have jurisdiction to prohibit respondent from having any ex parte communication with Dr. Rasmussen, claimant's authorized treating physician? Does the Board have jurisdiction over this issue in an appeal from a preliminary hearing order?

FINDINGS OF FACT

Claimant injured her left knee in an accident at work on May 11, 2010, when her foot got caught on some carpeting, causing her left knee to twist. After the accident, claimant was treated by Dr. Gerald McNamara. On July 2, 2010, Dr. McNamara performed arthroscopic chondroplasty of the medial and lateral femoral condyles and the patellofemoral joint on the left.

On October 6, 2010, the ALJ ordered respondent to provide claimant with medical treatment by either Dr. Steven Joyce, Dr. Mark Rasmussen, or Dr. Gerald Dugan. Thereafter Dr. Rasmussen became claimant's authorized treating physician.

Claimant testified that since the May 2010 accident, she has developed problems with her right knee and now her right knee is worse than her left knee. She attributes the right knee problems to overcompensating for her left knee injury. Claimant said while she was still in treatment for her left knee, her right knee started hurting while she was sleeping. She cannot remember when this began but said she thought it was while she was in physical therapy before she saw Dr. Rasmussen. Claimant said she did not have pain in her right knee before going to bed the night this began and did nothing to aggravate

her right knee while sleeping. Claimant described the pain as sharp and said she has gone to the hospital numerous times for pain.

Claimant said she now has a brace prescribed by Dr. Rasmussen, which she wears on her left knee. But claimant said usually halfway through the day, she has to put the brace on her right knee for stabilization.

Claimant acknowledged that she has had prior problems with both of her knees. The last surgery performed on her left knee before July 2010 was in 2001. The last surgery on her right knee was in 2003. In 2006, claimant had a series of injections of Euflexxa in both knees, which claimant said was not for pain but was to cushion the knees. Claimant said that before the accident of May 2010, she was able to play soccer with her children. Claimant denied that her condition has returned to her baseline, as was opined by Dr. Rasmussen. Claimant believes Dr. Rasmussen misunderstood a report from her physical therapist. Claimant has not been pain free in her left knee since the accident of May 2010. Her right knee has likewise not been pain free since it started bothering her after the accident due to overcompensating for the injured left knee.

Although Dr. Rasmussen's initial report is undated, his later reports indicate he first saw claimant on January 21, 2011. At the time, claimant was complaining mostly of her right knee. She told Dr. Rasmussen she believed she aggravated her right knee because she put more weight on it after her injury. Dr. Rasmussen noted it was not uncommon to have discomfort in the opposite extremity due to overuse when the other extremity is injured. He also noted her previous bilateral knee problems, although he also noted she was not having problems for some period before her May 2010 injury. Claimant also had some preexisting degenerative disease in her knees. Dr. Rasmussen believed claimant was back to her baseline as far as her left knee, although he told her to continue to be aggressive about continuing her strengthening exercises. In regard to her right knee, he believed that if she worked on strengthening her right knee and took some anti-inflammatories for a short period of time, her symptoms would return to baseline.

When Dr. Rasmussen saw claimant again in February 2012, claimant admitted she had not been good about doing her strengthening exercises. She returned to see Dr. Rasmussen in April 2012, where she told him her right knee was as painful as her left. In a letter to respondent's attorney dated May 23, 2012, Dr. Rasmussen stated:

On review, though her right knee was aggravated a year ago, since we felt she was back to her pre-injury level, I think we can probably assume now that her right knee is a natural progression of her disease prior to her injury. This is probably best treated with her own insurance versus her work comp insurance.²

² P.H. Trans., Cl. Ex. 1 at 6.

Also attached as exhibits to the preliminary hearing are the May 6, 2011, report of Dr. Edward Prostic and the October 13, 2011, report of Dr. Terrence Pratt. Dr. Prostic did not examine or comment on claimant's right knee. Dr. Pratt, who was asked to perform an independent medical examination by the ALJ, examined claimant's right knee as well as the left, but he gave no diagnosis concerning the right knee. Dr. Pratt did note that claimant had five previous procedures on her right knee from 1995 through 2003. He was not asked for a causation opinion. In fact, the ALJ's July 15, 2011, Order for an independent medical examination by Dr. Pratt contained specific instructions that he not address causation or restrictions.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

³ K.S.A. 2009 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁶ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁷ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁸

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁰

ANALYSIS

Claimant relates her right knee problems to overcompensation due to the left knee injury. Dr. Rasmussen agrees. Dr. Rasmussen is the only expert medical opinion in this record. His opinion is, therefore, uncontradicted. The fact that Dr. Rasmussen also believes that claimant's condition has returned to its baseline does not contradict his opinion that claimant suffered an aggravation as a direct and natural consequence of her left knee injury. Rather, it goes to the nature and extent of claimant's injury and to whether claimant is in need of additional medical treatment. Those are not issues the Board has jurisdiction to review on an appeal from a preliminary hearing order. Furthermore, claimant disputes Dr. Rasmussen's opinion in this regard. She testified that her right knee was asymptomatic before her left knee injury but remains symptomatic now. This shows that her right knee condition has not returned to its pre-injury condition. The ALJ apparently believed claimant because he awarded the requested benefits. This Board Member

⁵ *Id.* at 278.

⁶ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁷ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁸ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

⁹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹⁰ K.S.A. 2009 Supp. 44-555c(k).

agrees that if claimant is still symptomatic, then she has not returned to her baseline condition and her need for additional treatment is a consequence of the work-related injury.

In addition to authorizing Dr. Rasmussen to treat claimant's left and right knees, the ALJ also ordered respondent and its insurance carrier to not have any ex parte communication with Dr. Rasmussen. Respondent appeals that order, contending it is inappropriate because it applies only to the respondent and because, "[r]espondent has done nothing untoward in furnishing the necessary and appropriate medical treatment."¹¹ Claimant contends the Board is without jurisdiction to review that order. However, K.S.A. 44-555c(a) provides in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The record does not disclose the reason for this order. Claimant did not request such an order and the transcript of the preliminary hearing proceeding on June 19, 2012, makes no mention of it. Respondent was apparently not offered an opportunity to have a hearing and respond to this admonition before the order was entered by the ALJ. As such, this Board Member will reverse and remand this part of the Order for further proceedings on the question of whether any party should be prevented from ex parte communication with the authorized treating physician.

CONCLUSION

(1) Claimant's need for medical treatment to her bilateral knees is a natural consequence of her work-related injury.

(2) The ALJ's order that respondent/insurance carrier not have ex parte communication with claimant's authorized physician is reversed and remanded for further proceedings as set out above.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated June 20, 2012, is affirmed in part, reversed in part, and remanded.

IT IS SO ORDERED.

¹¹ Respondent's Brief at 9 (filed July 11, 2012).

Dated this _____ day of September, 2012.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge